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No. 05-, OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

GOSSELIN WORLD WIDE MOVING, N.V.
AND THE PASHA GROUP,

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit erred in concluding, contrary to the Ninth Circuit and to well-established rules of statutory construction, that an antitrust exemption provided by the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, does not apply to activities or agreements relating to the transportation of U.S. military household goods in foreign countries, solely because those activities or agreements also impact the transportation of goods within the United States.

**PARTIES TO THE PROCEEDING AND CORPORATE
DISCLOSURE STATEMENT**

Gosselin World Wide Moving, N.V. has no parent corporation and no publicly held company owns 10% or more of its stock.

The Pasha Group has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In *F. Hoffmeyer & La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004), this Court "caution[ed]" that "in today's highly interdependent commercial world," courts must "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." Congress took precisely such a step in the Shipping Act of 1984, crafting an exemption from the antitrust laws for "any agreement or activity concerning the foreign inland segment of through transportation that is part of the transportation provided in a United States import or export trade." 46 U.S.C. app. § 1706(a)(4). In the decision below, the Fourth Circuit ignored both the text and policy underlying this exemption and, in so doing, created a stark conflict with the Ninth Circuit.

In *United States v. Tucor Int'l, Inc.*, 189 F.3d 834 (9th Cir. 1999), the Court of Appeals held that, under the Shipping Act, shipping companies providing services to American military personnel stationed abroad enjoy immunity from the U.S. antitrust laws, even where the companies' conduct might impact the prices that the Government ultimately pays for their services. This statutory exemption grants due respect to the sovereignty of foreign nations by charging them with the responsibility for policing commercial conduct that occurs within their borders.

Petitioners in this case are a Belgian company and an American company who, like the defendants in *Tucor*, provide shipping services for American servicemen stationed abroad. Relying in good faith on *Tucor*'s interpretation of the antitrust exemption, see App. 49a, petitioners entered into agreements with German agents that were virtually identical to the arrangements at issue in that case.

The United States, however, chose to bring not simply a civil action for damages, but a *criminal prosecution* against

petitioners in the hope of persuading another court to depart from the rule in *Tucor*. Indeed, the Government can hardly dispute its manifest forum shopping here. The managing director of one of the petitioners, Gosselin World Wide Moving, N.V. ("Gosselin"), was actually arrested at a trade-association conference in the Ninth Circuit, in Hawaii; rather than charge him or petitioners there, the government conditioned his release upon the company's acquiescence to venue in the Justice Department's favorite venue, the more congenial Eastern District of Virginia.¹

Even so, the Government met with defeat. The district court (Lee, D.J.) recognized that this case was governed by the plain language of the Shipping Act as construed in *Tucor*. Accordingly, Judge Lee dismissed the antitrust charge. Undaunted, the Government marched on Richmond and prevailed. Reversing the district court, the Fourth Circuit held that, because petitioners' agreement with the German agents raised the total price that the United States pays for shipping, the exemption did not "concern" the "foreign inland segment" of through transportation. In reaching that conclusion in this criminal case, the Court of Appeals not only departed from the plain language of the statute, but it also ignored this Court's "traditional[] ... restraint in assessing the reach of a federal criminal statute," *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2134 (2005), and the parallel rule against extraterritoriality articulated in *Hoffman-La Roche*. This decision creates a direct conflict with the Ninth Circuit and virtually reads the antitrust exemption out of existence.

¹ Not only was Gosselin's director arrested in the Ninth Circuit, but the American petitioner, The Pasha Group, is a domiciliary of California. The Government's efforts at forum shopping thus can hardly be disputed.

In addition to creating a circuit conflict, the Fourth Circuit's decision extends the U.S. antitrust laws to regulate foreign commercial conduct already subject to the laws of other nations. Indeed, in this very case, the German government has notified Gosselin that, based on the conduct at issue, Gosselin faces a substantial penalty for violation of the German antitrust laws. Conflicting liability standards and multiple penalties are precisely the evils that Congress sought to avoid by crafting the Shipping Act's exemption from the antitrust laws.

Given the Government's ability to select the venue of future criminal prosecutions—particularly where the contracting agency resides in the Fourth Circuit—the Court of Appeals' cramped reading of the exemption will govern all future cases, absent intervention by this Court. The decision likewise stands as a precedent for courts construing other antitrust exemptions to ignore the comity concerns of *Hoffman-LaRoche*. Review is urgently warranted.

OPINIONS BELOW

The Fourth Circuit's decision is reported at 411 F.3d 502 and reprinted in the Appendix ("App.") at 1a-24a. The District Court's decision is reported at 333 F. Supp. 2d 497 and reprinted in the Appendix at 25a-54a.

JURISDICTION

The Fourth Circuit rendered its decision on June 14, 2005, App. 1a, and denied a timely petition for rehearing on July 12, 2005, App. 56a. Justice Thomas extended the time to file this petition up to and including November 25, 2005. This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

1. The Department of Defense administers the International Through Government Bill of Lading (ITGBL) program to provide for the shipping of personal goods of

civilian and military personnel stationed abroad. App. 28a. This program is run by a defense agency formerly called the Military Traffic Management Command (MTMC).² The MTMC administers a bidding process for each route running from a district in a foreign country to an area in the United States. Each shipping route is, in turn, divided into five segments, as the goods are carried from a foreign address to their final destination in the United States: moving services in a foreign country; port services in a foreign country; ocean transport services; port services in the United States; and moving and storage services in the United States. App. 28a. Different agents handle each segment, but these agents do not contract directly with the MTMC. Rather, the overall "through transportation" of military goods from an overseas base to a domestic address, *e.g.*, from Ramstein Air Force Base in Germany to Arlington, Virginia, is the responsibility of freight forwarders (also known simply as carriers), who serve as general contractors that subcontract each segment of the transportation route.

Twice a year, MTMC solicits bids from freight forwarders for what is called the "through rate." App. 28a; *see also* 46 U.S.C. app. § 1702(23) (defining "through rate" as "the single amount charged by a common carrier in connection with through transportation"). Freight forwarders file an initial bid for a particular transportation route. The lowest bidder sets a "prime rate" and is guaranteed a fixed percentage of the shipments for that particular route. The MTMC publishes a list of the lowest five bids, and in a second round of bidding, carriers may match, or "me too," the lowest rate. MTMC will not use freight forwarders with

² The Military Traffic Management Command changed its name on January 1, 2004, to the Surface Deployment and Distribution Command.

higher filed rates, unless those with lower rates have exhausted their capacity. App. 29a.

In determining their bids, freight forwarders must take into account the rates charged by agents on each segment of the transportation route. App. 28a. The ocean transport rate is set by a conference of ocean carriers and so constitutes a fixed cost. App. 29a-30a. The freight forwarder, however, must negotiate with local foreign agents the rates for foreign inland services (moving, storage, and port services). To do this, MTMC requires that each freight forwarder appoint a booking agent to serve as the freight forwarder's local representative. App. 30a.

Petitioners Gosselin, a Belgium company, and The Pasha Group ("Pasha"), a United States company, are general agents for freight forwarders: they book ocean transport services at the fixed ocean transport rate, and they book foreign port and inland services at rates procured from local agents.³ App. 27a, 30a. In addition, Gosselin serves as an agent for foreign inland services through its subsidiary, Gosselin GmbH. App. 60a.

2. In the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq.*, Congress crafted an exemption from the antitrust laws for the ocean and foreign stages of international shipping. Most relevant here, § 1706(a)(4) provides that the antitrust laws shall not apply to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or

³ Gosselin and Pasha offer freight forwarders a "landed rate," which bundles the rates charged for foreign services (moving, storage, and port services) and for ocean transport, and adds a commission. App. 59a-60a. Because the ocean transport rate is a fixed rate, the only variable is the foreign services rate. *Id.*